

# Was the Commission Right to Activate pre-Article 7 and Art 7(1) Procedures Against Poland?

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We believe that the Commission was right to take the steps that eventually resulted in triggering Article 7(1). Despite the Commission's best and repeated efforts, the rule of law situation in Poland has indeed been going from bad to worse under the stewardship of Poland's de facto leader and its "Law and Justice" governing party. If anything, the European Commission should have activated Article 7(1) sooner. As one of us wrote on this blog in October 2016, "considering the overwhelming evidence of a deliberate governmental strategy of systematically undermining all checks and balances in Poland as well the uncooperative behaviour of Polish authorities", the Commission ought to trigger Article 7(1) in order for national governments, meeting in the Council, "to step up to their responsibilities to isolate, if not to sanction a member state whose authorities are actively seeking to dismantle liberal democracy in their country."

To name but a few of the reasons which justified first the activation of the pre-Article 7 procedure and subsequently Article 7(1), one may first recall that in January 2016, Frans Timmermans correctly highlighted "the fact that binding rulings of the Constitutional Tribunal are ... not respected". Since then, "over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland ... The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch".

While Polish authorities like to repeatedly claim that criticisms are all due to misunderstandings, the European Commission's lack of expertise on Polish legal affairs or "biased political assessments", the Commission's concerns have been repeatedly shared by multiple national and international actors. In addition to the repeated warnings issued by the European Parliament, one may mention the repeated critiques originating from key bodies of the Council of Europe such as the Venice Commission, the Commissioner for Human Rights, and the Parliamentary Assembly. Beyond the EU and the COE, criticism has also been expressed by the United Nations Human Rights Committee, the OSCE Office for Democratic Institutions and Human Rights as well as representatives of the judiciary across Europe, including the Network of Presidents of the Supreme Judicial Courts of the European Union and the European Network of Councils for the Judiciary. Numerous civil society organisations such as Amnesty International and Human Rights Watch have also expressed concerns. Of course, tens of thousands of Poles themselves as well as Polish lawyers and judges have sought to fight back against repeated governmental attacks on their own judiciary and they have taken to the streets to protect the rule of law. The First President of the Supreme Court of Poland last December issued a shocking warning that there is an ongoing coup d'Etat against the judiciary by a government intent on destroying the constitutional structures of the state.

To speak of judicial “reforms” to describe and justify what has been happening in Poland is therefore at best misguided and at worst openly deceitful. Suffice it perhaps to quote here from an opinion adopted on 11 December 2017 by the Council of Europe’s Venice Commission to demonstrate how extraordinarily serious the threat to the rule of law in Poland is:

89. The proposed reform, if implemented, will not only threaten the independence of the judges of the SC [Supreme Court], but also create a serious risk for the legal certainty and enable the President of the Republic to determine the composition of the chamber dealing with the politically particularly sensitive electoral cases. While the Memorandum [submitted by the Polish government] speaks of the “de-communization” of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites.

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129. The Venice Commission has examined the Act on Ordinary Courts, the Draft Act on the National Council of the Judiciary, and the Draft Act on the Supreme Court, proposed by the President of the Republic. It has come to the conclusion that the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor’s Office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law.

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131. The Venice Commission stresses that the combination of the changes proposed by the three documents under consideration, and of the 2016 Act on Public Prosecutor’s Office amplifies the negative effect of each of them to the extent that it puts at serious risk the independence of all parts of the judiciary in Poland.

This is why, in a previous post co-authored with Professor Kochenov, we submitted that “the intensity and repeated nature of Poland’s ruling party’s attacks on the most basic tenets of the rule of law” warrant the activation of Article 7. When you add to the mix the capture of public media and frequent intrusions on the free press in Poland, obvious attempts to intimidate private media and ongoing attempts to “reform” electoral rules to make free and fair elections a thing of the past, it becomes self-evident that Poland has firmly entered Article 7(1) TEU territory. In fact, we believe that it is already far into the territory of Article 7(2). Poland is not at risk of breach; it has already breached the basic principles of the EU on multiple fronts.

It is however often argued that Poland is not the only culprit in the EU. To quote the Financial Times journalist Gideon Rachman, the Hungarian government “has gone even further than Poland in undermining the independence of the media and the courts, but has, so far, evaded censure ... the argument that the EU is guilty of double standards is bolstered by events in Spain, where elected politicians are in prison for staging a referendum on independence for Catalonia.”

This “double standards” argument is often used as a reason for doing nothing in any of the affected cases. The validity of the double standard critique will be examined by reviewing the situation in Hungary in our next post.

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SUGGESTED CITATION Scheppele, Kim Lane; Pech, Laurent: *Was the Commission Right to Activate pre-Article 7 and Art 7(1) Procedures Against Poland?*, *VerfBlog*, 2018/3/07, <https://verfassungsblog.de/was-the-commission-right-to-activate-pre-article-7-and-art-71-procedures-against-poland/>.